1983

Jonathan Robert Weber, By And Through His Guardians And Conservators, Donald R. Weber And Winona Weber, And Donald R. Weber And Winona Weber, Individually v. Springville City, Springville Irrigation Company, Thomas W. Biesinger, And John Does I Through V : Brief Submitted On Behalf of the Appellants

IN THE SUPREME COURT

OF THE STATE OF UTAH

JONATHAN ROBERT WEBER, by and through his guardians and conservators, DONALD R. WEBER and WINONA WEBER, and DONALD R. WEBER and WINONA WEBER, individually,

Plaintiff-Appellants,

vs.

SPRINGVILLE CITY, SPRINGVILLE IRRIGATION COMPANY, THOMAS W. BIESINGER, and JOHN DOES I through V,

Defendants-Respondents.

Case No. 59,146

BRIEF SUBMITTED ON BEHALF OF THE APPELLANTS

APPEAL FROM ORDERS OF SUMMARY JUDGMENT FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, HONORABLE DAVID SAM, JUDGE

JACKSON HOWARD and
D. DAVID LAMBERT, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84601
Telephone: (801) 373-6345
Attorneys for Plaintiff-Appellants

HAROLD D. MITCHELL, for:
STRONG & MITCHELL
197 South Main
P.O. Box 124
Springville, Utah 84663-0124
Telephone: (801) 489-5632
Attorney for Defendant
Springville Irrigation Co.

TIM DALTON DUNN, for
HANSON, RUSSON, HANSON & DUNN
650 Clark-Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 363-7611
Attorney for Defendant
Springville City

DON R. STRONG, for:
STRONG & MITCHELL
197 South Main
Springville, Utah 84663-0124
Telephone: (801) 489-5632
Co-Counsel for Defendant
Springville City

DARWIN C. HANSEN
110 West Center Street
Bountiful, Utah 84010
Telephone: (801) 295-2391
Attorney for Defendant
Thomas Biesinger

IN THE SUPREME COURT

OF THE STATE OF UTAH

JONATHAN ROBERT WEBER, by and through his guardians and conservators, DONALD R. WEBER and WINONA WEBER, and DONALD R. WEBER and WINONA WEBER, individually,	:	
Plaintiff-Appellants,	:	Case No. 59,146
vs.	:	
SPRINGVILLE CITY, SPRINGVILLE IRRIGATION COMPANY, THOMAS W. BIESINGER, and JOHN DOES I through V,	:	
Defendants-Respondents.	:	

BRIEF SUBMITTED ON BEHALF
OF THE APPELLANTS

APPEAL FROM ORDERS OF SUMMARY JUDGMENT FROM THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, HONORABLE DAVID SAM, JUDGE

JACKSON HOWARD and
D. DAVID LAMBERT, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84601
Telephone: (801) 373-6345
Attorneys for Plaintiff-Appellants

HAROLD D. MITCHELL, for:
STRONG & MITCHELL
197 South Main
P.O. Box 124
Springville, Utah 84663-0124
Telephone: (801) 489-5632
Attorney for Defendant
Springville Irrigation Co.

TIM DALTON DUNN, for
HANSON, RUSSON, HANSON & DUNN
650 Clark-Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 363-7611
Attorney for Defendant
Springville City

DON R. STRONG, for:
STRONG & MITCHELL
197 South Main
Springville, Utah 84663-0124
Telephone: (801) 489-5632
Co-Counsel for Defendant
Springville City

DARWIN C. HANSEN:
110 West Center Street
Bountiful, Utah 84010
Telephone: (801) 295-2391
Attorney for Defendant
Thomas Biesinger

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

OTHER

IN THE SUPREME COURT

OF THE STATE OF UTAH

JONATHAN ROBERT WEBER, by and through his guardians and conservators, DONALD R. WEBER and WINONA WEBER, and DONALD R. WEBER and WINONA WEBER, individually,	:	
Plaintiff-Appellants,	:	**Case No. 59,146**
vs.	:	
SPRINGVILLE CITY, SPRINGVILLE IRRIGATION COMPANY, THOMAS W. BIESINGER, and JOHN DOES I through V,	:	
Defendants-Respondents.	:	

BRIEF SUBMITTED ON BEHALF
OF THE APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an action against a landlord for negligence and breach of contract for failure to adequately maintain a fence, gate and common area which were represented to adequately protect small children living in his apartment complex from Hobble Creek and structures related thereto. It is also a negligence action against the irrigation district, and city, relating to creation and maintenance of an attractive nuisance and failure to protect the 2 and 1/2 year old plaintiff from the dangers therein.

DISPOSITION OF THE CASE IN THE LOWER COURT

Prior to trial, the Fourth Judicial District Court of Utah County granted defendants' motions for summary judgment.

NATURE OF THE RELIEF SOUGHT

Plaintiffs move the court to reverse the orders of the Fourth Judicial District Court of Utah County which granted defendants' motions for summary judgment.

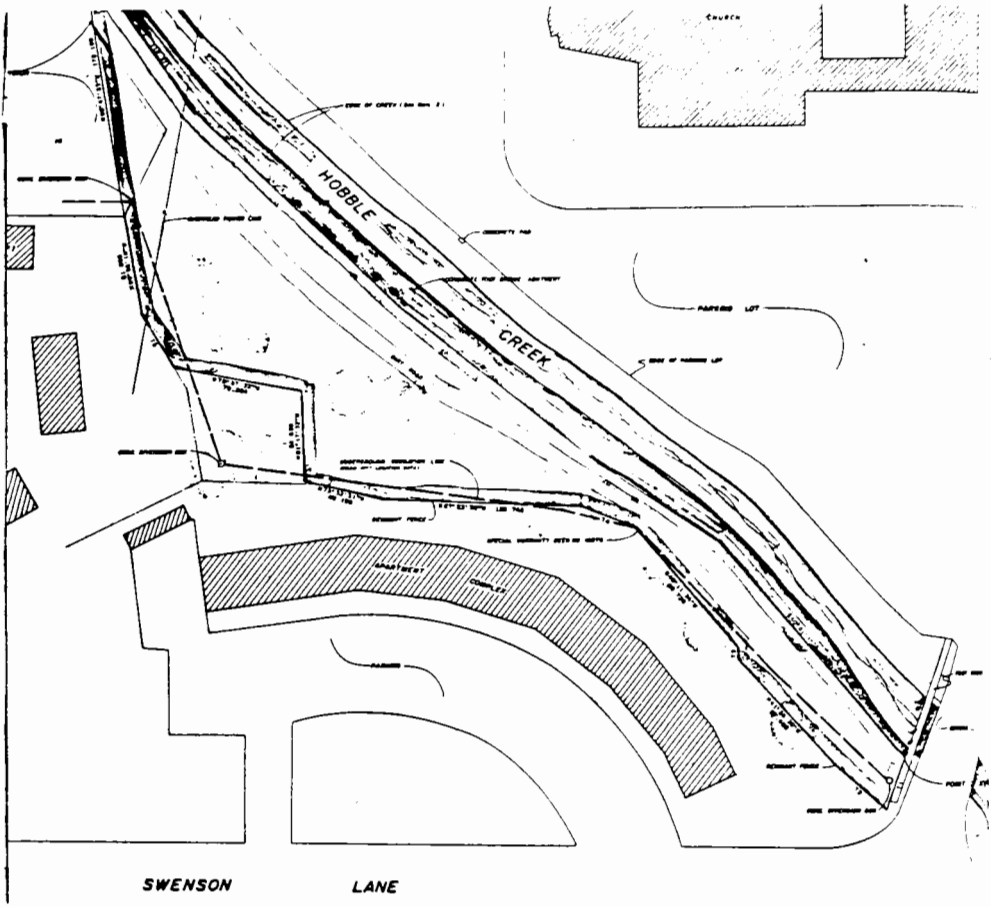
STATEMENT OF FACTS

The case before the court relates to certain real property and structures erected thereon which are located in Springville City, Utah County, State of Utah. A survey of the property is part of the record on appeal (R. 478). A copy of a portion of the survey is included herewith as the next page (p. 3) of this brief.

The building designated as the apartment complex is the building owned by defendant Biesinger at the time of plaintiff Jonathan Weber's injuries. Donald and Winona Weber were unloading their belongings and transferring them to apartment number 36 which they had rented from defendant Biesinger. (R. 529). Donald Weber had parked the vehicle containing his family's belongings in the parking lot near the southeast corner of the apartment complex (R. 569, depo. of Donald Weber p. 16).

The dam, the bridges located above the dam and other related structures were erected and maintained by defendants Springville Irrigation Company and Springville City as more specifically set forth at a later point in this Statement of Facts (p. 6).

In 1975, defendant Biesinger constructed the fence depicted in the survey to protect the small children living in the



Note:

1) Bridge is located on Seventh East just North of its junction with Swensen Avenue.

2) The dam of the Springville Irrigation Company is located directly east and adjacent to the bridge on Seventh East. The head gates and control wheels of the dam are accessed by a foot path and walkway over the diversion structure which attaches to the bridge.

apartment complex from the danger of the constantly running irrigation ditch on the adjacent property. (R. 574, depo. of Biesinger p. 8). The fence which defendant Biesinger constructed connected with the neighboring chain link fence on the west end. (R. 571 , depo. of Gene Wing p. 21). On the east end, however, the fence ended near the bridge, leaving a space through which people could pass; there was no side fence. (R. 571 depo. of Gene Wing p. 57). Hobble Creek, just 40 feet farther from his property in some places than the irrigation ditch, is full of water and dangerous during part of the year. (R. 574, depo. of Biesinger p. 8). After the irrigation ditch was covered defendant Biesinger felt the value of the fence had diminished, and therefore, the gate on the west end was not maintained, and the fence had been allowed to develop holes through which children passed. (R. 574, depo. of Biesinger, p. 9, 24, 31)

Shortly before the 13th of June, 1980, plaintiffs answered defendant Biesinger's advertisement for an apartment for rent. They were shown the apartment by agents of defendant Biesinger purporting to be the managers. Plaintiffs became concerned when they heard the sound of running water in nearby Hobble Creek. (R. 569, depo. of Don Weber p. 10, 11, 12). In the interest of the safety of their 2 1/2 year old son, Jonathan Weber, the plaintiffs specifically asked whether the common area was safe for children to play in and whether small children could gain access to the stream. (R. 569, depo. of Don Weber p. 10, 11, 12) Plaintiffs were reassured by defen-

dant Biesinger's agents that the common area was safe, that a proper and sufficient gate and fence had been placed to the rear of the property, and that children could not get to the stream. (R. 569, depo. of Don Weber p. 10, 11, 12)

Plaintiffs relied upon the representations of defendant Biesinger's agents and entered into a rental agreement with defendant Biesinger for the lease of the premises (R. 529). This lease agreement was signed by different agents of defendant Biesinger than those who first showed plaintiffs the apartment. (R. 569, depo. of Don Weber p. 10, 11, 12) Defendant Biesinger agreed, as a clause in the contract, to maintain both the interior and the exterior of the property in a safe and operable condition (R. 529).

The fence described by defendant Biesinger's agents was, in fact, in substantial disrepair, and was wholly inadequate to prevent access by small children to Hobble Creek (R. 355, 356, 425, 426). Additionally, the alleged gate in the described fence did not exist and left an opening in the fence for access to Hobble Creek (R. 355, 356, 425, 426).

On or about June 18, 1980, the plaintiffs were in the process of moving into the Biesinger apartment building when Jonathan Weber, age 2 1/2 years, gained access to Hobble Creek from the common area of the Biesinger apartment building (R. 7). Jonathan Weber fell into Hobble Creek and was rescued from the creek a short time after the discovery of his absence, but not before he sustained permanent debilitating physicial and mental injuries (R. 7). Jonathan Weber is presently a

spastic quadriplegic with severe brain damage which prevents his normal development and which requires extensive attention and significant expense for his maintenance (R. 7).

The following supplemental facts are necessary for the cause of action against Springville Irrigation Company: Springville Irrigation Company has the right to divert water out of Hobble Creek for irrigation purposes. (R. 569, depo. of Hardy LeRoy Child p. 5). Springville Irrigation Company constructed Swenson Dam. The dam is located directly east and adjacent to the bridge and is part of the bridge structure. (R. 134, 172). Hobble Creek is used as an overflow channel to release unused and unwanted irrigation water. (R. 567, depo. of Hardy LeRoy Child p. 9). When all of the water is used for irrigation purposes, Hobble Creek dries up. (R. 567, depo. of Hardy LeRoy Child p. 9). The watermaster, Hardy LeRoy Child, was aware that the children play at Swenson Dam in the summer and was fearful about it. (R. 567, depo. Hardy LeRoy Child p. 31).

These additional facts are necessary for the action against Springville City: Springville City performs maintenance each year on the Hobble Creek waterway which lies within its corporate boundaries. The City has responsibility for maintenance of the bridge located at 700 East and 650 South (R. 573, depo. of Carl Curtis, p. 10). The City has replaced diversion structures, pipes and bridge decks at Swensen Dam (R. 171, 172). It also clears debris from the stream and cleans the culverts (R. 570, depo. of Jack Windley, p. 11). In addition to maintaining structures on and in Hobble Creek,

Springville City also shores up the banks and dredges certain portions of the creek (R. 573, depo. of Carl Curtis, p. 16).

The city has assumed responsibility for the control of water hazards on Hobble Creek. It repairs irrigation culverts within the city limits. The Springville City ordinances refer to impounded water as an "attractive nuisance" (Springville City Ordinances §12-2-4, See Appendix"A"). Although not directly related to water hazards, the City issues building permits only upon compliance with regulatory provisions promulgated for the public safety, including the covering of irrigations ditches (Springville City Ordinances §10-1-4, See Appendix "B").

An irrigation waterway, running approximately parallel to the Hobble Creek waterway, traverses the property of defendant Virginia B. Law. The irrigation waterway was covered to eliminate the hazard which is presented to children. (Depo. of Biesinger p. 18)

ARGUMENT

POINT I

SUMMARY JUDGMENT IS A HARSH REMEDY, AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHEN SIGNIFICANT ISSUES OF MATERIAL FACT EXIST.

Rule 56(c) of the Utah Rules of Civil Procedure provides as follows:

> . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Defendants' motions for summary judgment should not be granted because significant issues of material fact exist and defendants are not entitled to judgment as a matter of law. The trial court, in granting the motions for summary judgment, ignored these essential principles of summary judgment analysis under Utah law.

First, upon motion for summary judgment, the trial court is required to consider all relevant facts and the reasonable inferences in a light most favorable to the party against whom the motion is made. The Utah Supreme Court commented on this issue in Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807, 809 (1966):

> A motion for summary judgment is a harsh measure, and for this reason plaintiff's contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial; and only if the whole matter is so viewed, he could, nevertheless, establish no right to recovery, should the motion be granted.

For other numerous references made by the Court to this proposition see, W.M. Barnes Co. v. Sohio Nat. Res. Co., 627 P.2d 56 (Utah 1981); Hughes v. Housely, 599 P.2d 1250 (1979); Livingston Industries, Inc. v. Walker Bank & Trust Co., 565 P.2d 1117, 1118 (Utah 1977); Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60, 62 (1967).

Second, if the facts and their reasonable inferences when viewed in a light most favorable for the non-moving party are in dispute, summary judgment is simply improper. In Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975), the Utah Supreme Court

stated:

> It is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.

Id. at 193. See also, Peterson v. Fowler, 29 Utah 2d 386, 510 P.2d 523, 526 (1978); University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29, 31 (1972); Transamerica Title Ins. Co. v. United Resources, Inc., 24 Utah 2d 346, 471 P.2d 165 (1970); and Robinson v. Employers Liability Assurance Corp., 22 Utah 2d 163, 540 P.2d 91, 92 (1969).

Under the above-stated principles of Utah law, plaintiffs submit that the defendants' motions for summary judgment should have been denied. First, if the facts and the reasonable inferences are viewed in a light most favorable to the plaintiffs, recovery is certainly possible. Second, there are dispositive issues of fact which are in substantial dispute, as are detailed in the following points of this brief. Third, this case is certainly not a "clear-cut" case for summary judgment, and the plaintiffs should be allowed the opportunity of "at least attempting to prove" their allegations. Durham v. Margetts, 571 P.2d 1332 (Utah 1979).

POINT II

THERE ARE UNRESOLVED ISSUES OF MATERIAL FACT AND THE DEFENDANT BIESINGER IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

Plaintiffs' cause of action against defendant Biesinger is based on negligence and defendant's breach of contract. The duty owed to plaintiffs by the defendant arises as a result of defendant's actions in renting his apartment to plaintiffs and from his affirmative representations, through his agents, to the effect that small children were protected from the adjacent hazard of Hobble Creek and its appurtenant structures. As is demonstrated below, the facts in this case are in dispute, and must be read in the light most favorable to the plaintiffs. Summary judgment is, therefore, not an appropriate means of resolving this matter.

A. There Are Material Issues Of Fact Relating to Defendant Biesinger's Contractual Assumption of A Duty To Jonathan Weber Based Upon The Representations Of His Agents, Plaintiffs' Reliance Upon Those Representations In Entering Into The Contract, And The Meaning of the Relevant Contract Provisions.

Plaintiffs' depositions on file herewith clearly indicate that representations were made to them by defendant Biesinger's agents that there were numerous small children who played in the common area of the apartment building, that the fence which inhibited access to Hobble Creek had been erected and was maintained for the purpose of preventing small children from entering the stream, and that the common area was safe. These representations were made at a time when the Webers were attempting to decide whether or not to rent an apartment from the defendant, and these representations were made as an inducement for them to rent. Plaintiffs relied on these

representations and but for the representations they would not have entered into the rental contract. The plaintiffs entered into a lease contract with the defendant Biesinger. As part of his contractual obligation, defendant contracted to maintain both the interior and exterior of the premises in a safe and operable condition. (R. 529). Plaintiffs have alleged by affidavits that the fence at the rear of the common area of the defendant Beisinger's apartments was in disrepair, without a proper gate, and incapable of adequately protecting small children from the adjacent hazard of Hobble Creek. (R. 355, 356, 425, 426). Therefore, defendant breached a material clause of the contract. Defendant argues that, on the basis of the testimony of Gene Wing that the fence was in good repair and did have a gate, he did not breach the contract (R. 502). Plaintiff Don Weber indicated that these representations were made by persons purporting to be managers. Defendant admits that there was another couple besides the Wing's who acted as managers during that time. (Depo. of Biesinger p. 12). Defendant Biesinger argues that the conversations should be characterized with reference to a subsequent alleged conversation with Mrs. Wing. (R. 500, 501) If the Court views the plaintiffs' contentions as set forth in their depositions and affidavits in a light most favorable to them, it is clear that a material issue of fact exists as to the nature of the representations made, and the obligations which defendant contractually undertook.

Regardless of what route Jonathan took, the fact that he

got to Hobble Creek after being placed in the apartment commons, indicates by itself that defendant misrepresented the state of the apartment commons when he, through his agents, represented that the children were safe and that access to Hobble Creek was inhibited.

As indicated by the above discussion, there is a dispute as to the material issues of fact concerning defendant's contractual obligations and his breach thereof.

B. There Is A Material Issue Of Fact As To Whether The Defendant Biesinger's Conduct Constituted An Assumption Of A Duty To Jonathan Weber.

Defendant Biesinger by his conduct and by his representations voluntarily assumed a duty. When the apartment complex was built defendant Biesinger constructed a fence with a gate to protect the small children in the complex from the danger of the running water in the irrigation ditch on the adjacent property. He recognized that Hobble Creek, just 40 feet farther from his property, was also dangerous. (R. 574, depo. of Biesinger p. 8) Defendant Biesinger, however, allowed the fence to develop holes through which children would pass and did not maintain the gate. (R. 574, depo. of Biesinger p. 9, 24, 31).

In the present case, the duty of defendant Biesinger is established by the statements of his agents, the apartment managers, to the Webers when they were looking at the apartments prior to moving in. When they inquired about the dangers of the creek to the rear of the property, the Webers

were told that children continually played in the back of the property, that there was a protective fence between the yard and Hobble Creek, and that there wasn't any worry of danger to the children. (Depo. of Don Weber pp. 10, 12)

With respect to the plaintiffs' position that the defendant Biesinger voluntarily assumed a duty to the plaintiffs, the Federal Court for the District of Utah has ruled that if the Utah Supreme Court were to consider the issue of good samaritan liability they would adopt that theory of liability as set forth in the Restatement (Second) of Torts §§323 and 324(A). Barnson, et al. v. United States, 531 F.Supp. 614 (D.C. Utah 1982). Those Restatement sections indicate that if a party undertakes to perform an act, and third parties rely on that undertaking, then the third parties may maintain a cause of action against the good samaritan for negligently performing the said undertaking. In the present case, plaintiffs have alleged that the landlord undertook to construct a fence and other structures to inhibit access to Hobble Creek, and that they made representations to that effect to the plaintiffs in order to induce them to rent from the defendant. Plaintiffs' reliance on said representations has been alleged and is justifiable under the circumstances.

There are material issues of fact raised by the depositions, affidavits and other matters on file relating to each of the elements set forth by the restatement.

The facts of Herdt v. Koenig, 119 S.W. 56 (Mo. 1909) are closely akin to the facts in the instant case. A landlord

maintained a common yard behind a building which was used by children living in the apartment and their friends as a play area. Immediately adjacent to the landlord's property was a quarry, and the landlord had constructed a fence separating the common yard from the quarry. However, the fence was dangerously constructed, and when one of the children leaned against a board of the fence, the top board loosened and detached from the post, and the child fell into the quarry. The defendant/landlord argued that since the quarry was on the land of another, he was not liable for the child's injury. The court disagreed saying:

> . . . it is urged that the quarry in this instance is not located upon the defendant's premises, and therefore no liability attaches to him on account thereof. It is sufficient to say on this score that, while the quarry was not upon the defendant's premises, it was immediately adjacent to and rendered the common yard dangerous. This fact was recognized by the defendant and all concerned. In view of the danger attending the situation, the defendant had erected the fence referred to, to the end of discharging his obligation to exercise reasonable care for the safety of those rightfully upon the premises. Having erected a fence upon his premises as a barrier to the attendant dangers of the quarry, it, of course, evolved upon him to exercise ordinary care to maintain the fence reasonably safe for the purpose. Herdt v. Koenig, 119 S.W. at 59.

When defendant Biesinger built the apartments, Hobble Creek and the open irrigation ditch were close by and posed a threat to the safety of the children in the complex. Defendant Biesinger recognized his duty at that time and constructed a

fence with a gate. (Depo. of Biesinger p. 8) It would be difficult for defendant Biesinger to claim now that he could not foresee the risk of harm to the small children when he allowed the fence to deteriorate and did not replace the gate. In fact, he worried about the hole in the fence, recognizing that it had posed a threat to the safety of the small children. (Depo. of Biesinger p. 31)

C. There Is A Material Issue Of Fact As To Where Jonathan Weber Fell Into Hobble Creek.

Jonathan Weber was an infant 2 1/2 years old when the incident occurred. His mother had placed him on the east lawn of the apartment complex with some toys to play with. (R. 571, Depo. of Gene Wayne Wing p. 12, 62) Mr. Wing was in front of the complex watering the lawn, and Mrs. Wing was sitting on the porch of her apartment at the west end of the complex, and neither saw Jonathan go across the sidewalk in front of the complex. (R. 571, depo. of Gene Wayne Wing p. 62, 63, 64) Therefore, it is highly probable that Jonathan went into the back of the complex. He could also have gone up the hill to the bridge on the east side of the complex, past the bridge to the church parking lot, and then gone down to Hobble Creek and fallen in, but considering the child's age, his lack of familiarity with the surroundings, and the short time between when he was missed and when he was rescued, it is more probable that he went into the backyard, and either through a hole or through the opening where the gate should have been along the well-worn path to Hobble Creek. There is a genuine issue of fact as to where he went into the water.

Regardless of what route he took, the fact that he got to Hobble Creek after being placed in the apartment commons, indicates by itself the nature of the mispresentation to plaintiffs, that the children were safe and that access to Hobble Creek was inhibited.

D. Public Policy Should Require That When A Businessman Enters Into An Activity For Profit, And There Is A Known Danger Close By, And There Is No One Else Who Will Make The Venture Safe, And There Is An Economical And Feasible Way To Make It Safe, He Has A Duty To Make It Safe.

Defendant Biesinger built the apartment complex in 1975 with the intention of renting to families with children. Because of his profit motive he brought small children in close proximity to a serious danger.

The intervening property between that owned by defendant Biesinger and Hobble Creek is a narrow strip of property owned by the Laws and the L.D.S. Church which is vacant and which is unusable for the construction of any residential improvements due to the narrowness of its width and the lack of access to it.

Since there is no one else who would have any motive to make Hobble Creek safe for the nearby children, the duty should fall upon defendant Biesinger who brought the children near to the danger in the first place because of his profit motive.

Realizing that he had a duty to protect the children from the adjacent danger, defendant Biesinger erected a fence and

gate. Having undertaken the duty, and having represented that he had made the premises safe, he should have the liability for his negligence in the maintenance of the fence. To allow summary judgment in favor of defendant Biesinger would open an avenue for nonliability for all landlords whose land is in close proximity to a dangerous condition. By deeding a small strip of land bordering the danger to another entity or individual, or by refusing to purchase a narrow strip on the border, a landlord would be able to insulate himself from all liability merely by claiming that the dangerous condition is not on his land. The law should not allow a landlord to escape the duty he owes to his tenants by removing his ownership interest a short distance from the hazard, and then totally disregarding any obligation that he otherwise would have incurred.

Public policy should require that when a businessman enters into an activity for profit, and there is a known danger close by, and there is an economical and feasible way to make it safe, that he has a duty to make it safe. Breach of that duty results in liability.

POINT III

THERE ARE UNRESOLVED ISSUES OF MATERIAL FACT RELATING TO THE ACTS AND OMISSIONS OF SPRINGVILLE IRRIGATION COMPANY AND DEFENDANT SPRINGVILLE IRRIGATION COMPANY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. There Is A Genuine Issue As To Whether The Defendant Maintained A Condition Which Posed An Unreasonable Risk To Children, And Was Negligent In The Protection Of The Diversion Access.

Springville irrigation Company exercised dominion and control over Swensen Dam and the diversion structures located adjacent to the apartment complex.

The irrigation company did not own the land where the diversion was made, but it had the right of diversion, and the rights of ingress and egress to the point of diversion. It also had the right to construct a dam in the streambed. Although it denied the right to control water released downstream from the dam, Hobble Creek was used as an overflow system to release unwanted or unused irrigation water. These rights do not rise to the level of fee ownership, but they are possessory interests in the land.

The dam across the stream was an artificial condition which was attractive to children. When asked whether children were seen going over Swenson Dam in the summer, the watermaster, Hardy LeRoy Child, indicated in his deposition that the children were there " . . . every day of . . . the summer. I'm scared some days to go up there." (Depo. of Hardy Child p. 31) A child of Jonathan's age would be attracted to the tumbling waters of the diversion dam without a realization of the danger to him. The irrigation company knew that children were attracted to the dam because the children were seen there throughout the summer and the irrigation company also knew that the diversion work posed an unreasonable risk of bodily harm, evidenced by the watermaster's fear of the children playing there. Utah has been reluctant to apply the "attractive nuisance" doctrine to canals because of the massive

network of open ditches that interlace the arid farmland. It would be an onerous burden for irrigation companies to fence or pipe every irrigation ditch; however, where the irrigation company maintains the diversion work which is a gathering place for young children in a residential neighborhood, and fails to exercise care in denying access to the diversion when the single location could easily be fenced and controlled, they have failed to exercise reasonable care to eliminate the danger and protect the children. Utah case law supports liability where structures which create an unreasonable risk of injury are placed in a streambed. Brown v. Salt Lake City, 93 P.570 (Utah 1908).

B. Even Where The Courts Have Been Reluctant To Apply The Attractive Nuisance Doctrine, Relief Has Been Granted On Theories Of Common Law Negligence.

In Partin v. Olney, 591 P.2d 74 (Ariz. App. 1978), two small boys were playing in an irrigation ditch, and had been seen by an irrigation company official who failed to warn them of the unforeseen hazards. The next day one of the boys drowned in the canal. The court said that where an agent of the company knows of the presence of children and the danger to them, and fails to take any action to remove the children, he has acted in reckless disregard of the safety of the children. If the agent acts recklessly in the course of his employment, the attractive nuisance immunity for irrigation canals would not protect the irrigation company from liability.

The Springville Irrigation watermaster had a duty to

remove the children from the diversion work when he knew that they played at the dam site and the diversion water posed an unreasonable risk to them. The irrigation company also had a duty to restrict access to the diversion works. Through the negligent breach of its duty, the Springville Irrigation Company is liable under a negligence cause of action.

C. There Is A Genuine Issue Of Fact As To Where The Plaintiff, Jonathan Weber, Fell Into Hobble Creek.

Despite the fact that no one actually saw Jonathan fall into Hobble Creek there are several reasons why Jonathan may have fallen in at or near the irrigation diversion. 1) The 700 East crossing and the Swenson Dam are the stream access points nearest the apartment the Webers were moving into. The time within which the accident occurred supports the conclusion that Jonathan could have fallen in at the diversion works. 2) Swenson Dam is the most easily entered stream access point on the south side of the creek. Jonathan could have easily proceeded to the diversion location, fallen in, and could have been swept to where he was retrieved in 30 second feet of water, which was the approximate stream flow below the diversion when the accident occurred. (Depo. of Hardy LeRoy Child, p. 6, 9) 3) For Jonathan to have fallen into the stream through access at the extreme west end of the building, he would have had to walk the entire length of the building. Then he would have had to turn north, walk past the garbage receptacles, across the backyard, past the dogs of which he was fearful (Depo. of Don Weber p. 48, 53, 54), go

through an opening in the fence and finally cross a large sandy area before he reached the stream bank. (Depo. of Don Weber p. 49-56) This route is particularly long with many more obstacles than the 700 East crossing near the diversion works. 4) In looking for Jonathan, Donald picked a logical path that a young child would follow. He first glanced south across the parking lot to an open area, hoping the child would be there. He then proceeded east, around the eastern end of the building to where he could see the 700 East crossing and Swenson Dam area. (Depo. of Don Weber p. 59) After discovering that the boy was not on the banks to the east, Donald searched the backyard, and did not proceed to the western end of the building and north to the streambed until the previously mentioned areas had been searched. (Depo. of Donald Weber p. 20-23). The child was found approximately 10 minutes after he was missed at 300 South and 400 East Street approximately 3000 feet from the apartment house.

POINT IV

SPRINGVILLE CITY OWED A DUTY OF CARE TO THE PLAINTIFFS ARISING OUT OF 1) CITY ORDINANCES AND 2) THE VOLUNTARY ASSUMPTION OF A DUTY.

The duty of Springville City to the plaintiffs arises by 1) City Ordinances, and 2) By voluntary assumption. The City has enacted an ordinance which states:

> "It shall be unlawful to cause, create, maintain or be the author of an attractive nuisance within the city. Any vacant lot or open area of ground into which the public, and particularly children, has access within which any of the following conditions occur is an attractive nuisance: (1) Ponding or impounding of water... (Springville City Ordinances §12-2-4, R. 431, Appendix "A".)

Plaintiff, in the above statement of facts, has pointed to several admitted practices on the part of the city, which at the very least, present a material issue of fact as to whether the city has caused, created, maintained or been the author of an attractive nuisance under its own definition. There is a material issue of fact as to whether the conditions of Hobble Creek, Swensen Dam and related structures constitute the ponding or impounding of water.

Springville City assumed the responsibility of making safe the buildings constructed within its boundaries. It issued permits for that purpose. It also required that no building permit be issued for any property crossed or fronted by an irrigation ditch unless the ditch was covered or would be covered by the proposed construction. Springville City also assumed responsibility for the upkeep of Hobble Creek to protect its citizenry from the water hazard.

When a governmental entity takes upon itself the responsibility of caring for its citizenry affirmatively, it assumes the position of a "good samaritan" and is liable for its negligence. This principle was espoused in Barnson, et al. v. United States, 531 F.supp. 614(D.C. Utah 1982). In that case, the plaintiffs alleged, among other causes of action, a cause of action for negligent inspection. The defendant moved for summary judgment but the motion was denied on the following basis:

> Plaintiff's principle legal argument supporting these claims is that defendant is liable on a "good samaritan" theory, based on Restatement (Second) of Torts, Sections 323 and 324A (1965). Section 323 postulates liability for one who undertakes to render services to another which he should recognize as necessary to protect the other, and fails to exercise reasonable care in performing that undertaking, so that either the risk of harm to the other is increased or the harm is suffered because the other relied on the undertaking. Section 324A similarly defines liability when one undertakes to perform services for another with the same result, but necessary for the protection of a third person. In addition, Section 324A permits liability where the undertaking is a duty owed by the other to the third person.
>
> While the Utah Supreme Court has apparently never addressed or adopted the "good samaritan" doctrine, this court is of the opinion that it will adopt it when it is presented with the theory and appropriate facts. The court specifically notes that the Utah legislature has passed a statute exempting from liability medical practitioners who render emergency aid in good faith. See Utah Code Ann. §58-12-23(1974). This statute appears to anticipate a "good samaritan" theory of liability, much as the Utah Products Liability Act, Utah Code Ann. §78-15-1 to 6(1977), anticipated the Utah court's later adoption of §402A of the restatement, which adoption was predicted four times under the Erie doctrine by this circuit (citations omitted). 531 F.Supp. 621.

A case cited in Barnson, above, sheds additional light on the duty imposed on a governmental entity when it assumes a responsibility over inspections, licensing, and certification. United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1980) involved a suit against the federal government for failure to properly inspect an airplane under federal regula-

tions. In allowing suit against the federal government the 9th Circuit said:

> The FAA in inspecting and certifying the aircraft for air worthiness, was rendering a service for others, rather than performing regulatory duties, and thus came within the "good samaritan" doctrine formulated in Restatement (Second) of Torts; the basis of the claim against the government being the negligence of the administration's inspection in which the air worthiness certificate was issued. The court further held that the FAA regulation of the airline industry in its inspection of aircraft were not discretionary functions for the purpose of the Tort Claims Act.
>
> To the extent that the government is arguing that because "inspection and certification" of aircraft is a uniquely governmental function, liability may not be predicated upon misfeasance in such activity the government is plainly wrong (citations omitted). 614 F.2d 192.

The defendant Springville City is a "good samaritan" under the Barnson case. It assumed a duty to the plaintiffs to protect them from Hobble Creek floodwaters. It breached its duty when it 1) failed to impose adequate requirements as a condition of issuing a building permit, ie. fencing, covering or other protection; and 2) Created and maintained a dangerous condition, eg. the retaining wall which guides a fast flowing floodstage stream. (More than 30 c.f.s., R. 567, depo. Hardy LeRoy Child, p. 6).

POINT V

SPRINGVILLE CITY AND SPRINGVILLE IRRIGATION ARE JOINT TORTFEASORS IN MAINTAINING AN ATTRACTIVE NUISANCE WITHIN THE CITY LIMITS

Springville City and Springville Irrigation Company, in contesting that Hobble Creek was not an attractive nuisance,

have relied on the common law developed by the courts at the turn of the century. To begin with, this common law has been superceded by Springville City Ordinance §12-2-4 which defines the "ponding or impounding of water" as an attractive nuisance, and prohibits such ponding when children and the public have access to the area. The city and the irrigation company have violated the ordinance by building and maintaining Swensen Dam, and the structures surrounding it without necessary protection for the public. A dam, by definition, is an impounding device. The city cannot say that the impoundment is not an attractive nuisance, when it has affirmatively defined an attractive nuisance to include such physical impoundments of water. Even in the absence of the statutory definition, the common law development of the attractive nuisance doctrine with respect to irrigation streams has changed over the years. The cases of Chavoz v. Salt Lake City, 131 P. 901 (Utah 1913), and Sallady v. Old Dominion Copper Mining Co., 100 P. 441 (Ariz. 1909. cited by the defendant in its Memorandum in Support of its Motion for Summary Judgment were early hardline developments in protecting irrigation companies from liability as an economic necessity; however, this hard line doctrine has been softened in subsequent cases. In a recent Utah case, Brinkerhoff v. Salt Lake City, 371 P.2d 211 (Utah 1962), the Utah Supreme Court held that an irrigation canal was not an attractive nuisance and that Salt Lake City was not liable for the drowning of a child because of failure to fence the canal; however, the ruling was decided by a narrow 3 to 2 vote, and a

strong dissent was written regarding the negligent mainenance of an artificial condition which poses an unreasonable risk to small children.

The Arizona courts have radically changed their position since Sallady, supra. In Marble v. Parham, 416 P.2d 1006, 1008, (Ariz. App. 1966), the Arizona Court said:

> We are impressed with the humanitary trend in favor of the child which lessens the impact of. . . Sallady. 416 P.2d 1008.

In a later case, Harris v. Buckeye Irrigation Co., 578 P.2d 177 (Ariz. 1978), a suit was brought against the irrigation company after a 12 year old boy allegedly fell into the irrigation canal while riding a bicycle over a bridge that crossed the canal. The trial judge granted the defendant's motion for summary judgment, but the Arizona Supreme Court reversed and remanded the case to the trial court saying:

> The defendant placed a bridge at a point where it could be anticipated that the public would use it to cross the canal... .it could be reasonably expected that children, as well as adults, would use this bridge. The defendant also had ample notice of the fact that the bridge was potentially dangerous. The bridge was in fact, open to the public generally and the defendants did nothing either to restrict the use of the bridge by the public or to make it safe for the persons they knew were using the bridge.
>
> The immunity given to irrigation districts in Sallady, supra, was based in sound public policy at the time...unfortunately, this immunity sometimes leads to the callous "public be damned" policy...." 578 P.2d at 180.

In the instant case Springville City maintains a bridge

over the stream with a footpath alongside. It also has helped to maintain the diversion structures in and about Swensen Dam. The present status of the law disfavors denying a plaintiff recovery under the attractive nuisance doctrine where a child has been injured by an irrigation stream. Springville City and Springville Irrigation Company should not be excused from liability relying on an outdated doctrine, particularly where they have affirmatively defined the forbidden activity in which they have participated.

POINT VI

THE INABILITY OF THE PLAINTIFFS TO PINPOINT THE EXACT LOCATION WHERE JONATHAN WEBER ENTERED HOBBLE CREEK DOES NOT FORECLOSE ACTION AGAINST SPRINGVILLE CITY OR SPRINGVILLE IRRIGATION COMPANY

Springville City had control over the entire length of Hobble Creek. Springville City and Springville Irrigation Company exercised substantial control over the pertinent portion of the Hobble Creek streambed and the artificial structures thereon. The city repaired concrete retaining walls and bridges, shored up the banks and dredged the streambed when it felt it was necessary to channel the stream.

A determination of the exact location where Jonathan Weber fell into Hobble Creek is admittedly not possible. No person was present when he entered the stream, and he is not mentally able to recount the incident, however, the observations of Don Weber, Winona Weber, Wayne Wing and Inga Wing, together with the timing of the event and the limitations of a two and one half year old child all provide sufficient

evidence to show the approximate location of Jonathan's entry into the stream.

Springville City had assumed control over the entire stream and their liability is commensurate therewith. Although certain portions of Hobble Creek may not have been disturbed, the city had assumed an interest in the maintenance of the entire stream, and is responsible for consequences resulting from such actions.

POINT VII

DUE TO THE DOCTRINE OF JOINT LIABILITY ALL DEFENDANTS ARE STILL LIABLE FOR THEIR NEGLIGENCE DESPITE PLAINTIFF'S INABILITY TO PROVE THE EXACT LOCATION OF THE INJURY.

In the landmark case of Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948), three hunters, the plaintiff and two defendants, were hunting quail together. The plaintiff became separated from the defendants, and while waiting for them to come towards him, some quail flew up, and the defendants both shot at the quail. Pellets from one of the defendants' shots struck the plaintiff in the eye and in the lip. The plaintiff brought suit against the defendants for negligence, but could not prove which of the defendants shot the pellets which actually injured him. Despite the impossibility of this proof, the trial court found both defendants liable. This decision was appealed to the California Supreme Court which affirmed the trial court saying:

> Dean Whitmore has this to say: "When two or more persons by their acts are possibly the sole cause of the harm, and when two or more acts of the same person are

> possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same persons' two acts, is culpable, then the defendant has the burden of proving that the other person or his other act was the sole cause of harm (b). . .The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practicle unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion among themselves.
>
> * * * *
>
> When we consider the relative position of the parties and the results that would flow if the plaintiff were required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers--both negligent towards the plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape, the other may also and plaintiff is remediless. 199 P.2d at 3-4.

The Summers court relied heavily upon an earlier Mississippi decision, Oliver v. Miles, 110 So. 666 (Miss. 1926). In Oliver, the facts of which parallelled Summers, the Mississippi court held:

> "We think that...each (defendant) is liable for the resulting injury to the boy, although no one can say definately who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent and the injury resulted from such negligence. 110 So. Page 668.

One of the latest discussions of this theory of joint liability is contained in Sindell v. Abbott Laboratories, 163 Cal. Rptr. 132, 607 P.2d 924 (1980). In that case, a woman had contracted cancer of the bladder because of the drug called DES which her mother had taken during pregnancy. The plaintiff's injuries did not surface until some 20 to 30 years after the drug had been ingested. The drug had also been produced by approximately 200 drug manufacturers. The defendants in this case demurred to the complaint, and the trial court sustained the demurrer on the grounds that the plaintiff could not identify which defendant had manufactured the drug responsible for her injuries. The California Supreme Court reversed the decision of the trial court, and developed a hybrid of the Summers, doctrine in holding the defendants liable:

> "The most persuasive reason for finding plaintiff states a cause of action is that advanced in Summers; as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in Summers, plaintiff is not at fault in failing to provide evidence of causation and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.
>
> From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. 607 P.2d 936.

The principles enunciated in the above cited cases are directly applicable to the present case. Each of the named defendants owed a duty to the plaintiff. Defendant Springville

City should have required that a safe fence be erected as a condition to receiving a building permit. Having permitted the building of Swensen Dam, the city should have required that adequate precautions be taken, ie. fencing, to protect against what the city ordinance defines as an attractive nuisance. Finally, having undertaken to improve, maintain, and alter the condition of Hobble Creek, by building retaining walls, replacing diversion structures, and dredging and clearing debris, the city voluntarily assumed the duty to make Hobble Creek safe. The defendant Springville City breached its duty.

Springville Irrigation Company created an attractive nuisance. Children played at Swensen Dam all summer, and the agents of the defendant were fearful for the safety of the children, yet they did nothing about it. Springville Irrigation Company had control of the flow of water down Hobble Creek to the extent that sometimes there was no water below Swensen dam, and when there was water in Hobble Creek it was the overflow of the irrigation system. Having materially altered the nature of Hobble Creek, and having created an attractive nuisance, the defendant Springville Irrigation Company owed a duty to plaintiffs which they breached.

Defendant Biesinger made representations to plaintiffs upon which they relied in entering into a contract with defendant. Defendant contractually undertook to keep the apartment building safe by maintaining the fence which he represented inhibited access to Hobble Creek. He maintained

control over the common area of the apartments but allowed a condition to develop that posed a risk of harm to small children. Futher, having undertaken to fence against the dangerous running water behind his property, his negligent abandonment of the maintenance of the fence was a breach of his duty. Each of the defendants were negligent and as between the plaintiff and the negligent defendants, the latter should bear the cost of injury.

CONCLUSION

Defendant Biesinger clearly owed a duty to his tenants to maintain the common area in a safe condition for the use of his tenants. He acknowledged that duty by building a fence, and then repesented through his agents that the area was safe. He breached his duty by failing to maintain the fence and gate and the injuries to plaintiff Jonathan Weber were proximately caused by the negligence of defendant Biesinger.

Defendant Biesinger also contractually assumed a duty to prevent access by small children to Hobble Creek by providing and maintaining an adequate fence. He breached his contractual obligation and the injuries to Jonathan Weber were foreseeable. The defendant is not entitled to judgment as a matter of law because there are material issues in question, and his motion for summary judgment should have been denied.

Defendant Springville Irrigation District created an attractive nuisance and altered the nature of Hobble Creek. It breached its duty to plaintiff and is not entitled to judgment as a matter of law because there are material issues in

question and defendant's motion for summary judgment should have been denied.

The defendant Springville City owed a duty to Jonathan Weber to guard against the attractive nuisance and hazardous condition present as a result of actions by Springville city and others whom it had power to control. While the duty of Springiville City may be partially a voluntarily assumed duty, it is still required to comport with the standard of due care.

The question as to the precise point of entry into Hobble Creek by Jonathan Weber is not dispositive in the present case; therefore the defendants' motions for summary judgment should have been denied. Plaintiffs respectfully ask the court to reverse the orders of the Fourth Judicial District court of Utah County granting defendants' motions for summary judgment and to remend the case for trial.

DATED this 8th day of December, 1983.

Jackson Howard
JACKSON HOWARD and

D. David Lambert
D. DAVID LAMBERT, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff-Respondent

MAILING CERTIFICATE

MAILED two copies of the foregoing to Mr. Harold D. Mitchell, Strong & Mitchell, 197 South Main, P.O. Box 124, Springville, Utah, 84663; Mr. Don R. Strong, Strong & Mitchell, 197 South Main, Springville, Utah, 84663; Mr. Tim Dalton Dunn, Hanson, Russon, Hanson & Dunn, 650 Clark-Leaming Office Center, 175 South West Temple, Salt Lake City, Utah, 84101; and Mr. Darwin C. Hansen, 110 West Center Street, Bountiful, Utah, 84010; postage prepaid, this 8th day of December, 1983.

SECRETARY

(18) To fail to [illegible] factories, [illegible] quired to [illegible]

(19) To display, [illegible] or any other article of food [illegible] citrus fruits or vegetables above rind or [illegible] eating, unless they be covered to protect them from any form of contamination

(20) To neglect or refuse to discontinue the use of, clean out, disinfect and fill up all privy vaults and cesspools within twenty days after notice from the City-County Health Department

(21) To permit any lot or excavation to become the repository of stagnant water or any decaying or offensive substance

(22) to obstruct the street or sidewalks without the permission of the City Council

(23) To allow snow and ice to accumulate on any paved sidewalk, abutting the property of any owner, occupant, or lessor

(Statutory Authority I.C.A. §10.7-60; 1968 Code §8.2.3; amended in codification)

12-2-4: Attractive Nuisances. It shall be unlawful to cause, create, maintain or be the author of an attractive nuisance within the City. Any vacant lot or open area of ground into which the public, and particularly children, has access within which any of the following conditions occur is an attractive nuisance:

(1) Ponding or impounding of water;

(2) Open pits, shafts, caves, or delapidated non-occupied buildings;

(3) Noxious weeds or vegetation;

(4) Trash, debris or machinery

(Statutory Authority I.C.A. §10.8-60; added in codification)

12-2-5: Duty of Health and Police Departments. It shall be the duty of the Health Department, and the right of the Chief of Police, to cause all nuisances declared to be such in this Title to be abated, and said Health Department and all police officers shall have authority in the daytime to enter any house, stable, store, or any building, in order to make a thorough examination of cellars, vaults, sinks, or drains; to enter upon all lots and grounds and cause all stagnant water to be drained off and pools, sinks, vaults, drains, holes, or low grounds to be cleaned, filled up, or otherwise purified, and to cause all noisome substances to be abated or removed. Whenever in the opinion of the Health Department, any building or dwelling has because of its unsanitary condition become a menace to life or health, or unfit for human habitation, the Health Department shall have the power to close to occupancy said building or dwelling and cause the same to be vacated until the same is put in a clean and sanitary condition as re-

the public, the building inspector shall require and the applicant shall furnish with each application for a building permit two sets of plans and specifications for such building which shall be certified to by an architect licensed by the State of Utah. Such certificate shall state that such building has been designed to conform to all provisions of this Title as well as all zoning requirements and the fire code then in effect in the City. The plans and specifications shall contin such information and be drawn and prepared in such manner as required by the building code. When authorized by the building inspector, plans and specifications need not be submitted for small and unimportant work and such other types of buildings or construction as designated in the building code.

(1968 Code §10-1-4 as amended by Ordinance No. 3-70; amended in codification).

10-1-4: Irrigation Ditches. No building permit shall be issued for any property which is crossed by or fronted by an irrigation ditch, unless the plans and specifications for the construction to be accomplished thereon provide for the covering of such irrigation ditch.

(Added in codification)

CHAPTER 2

PLUMBING CODE

10-2-1: Utah Plumbing Code Adopted. The Utah Plumbing Code as published by the Utah State Board of Health, 1974 Edition, is hereby adopted as the City Plumbing Code. The same is adopted, with the modifications set forth in this Title, as if fully set forth herein. The City Recorder shall maintain at least three copies of said plumbing code in his office for use and inspection by the public as required by state law. It shall be unlawful to install, alter or repair any plumbing in the City in violation of, or without complying with, such plumbing code.

(1968 Code §10-2-1 as amended by Ordinance No. 3-70; amended in codification).

CHAPTER 3

ELECTRICAL CODE